teacher of constitutional law, with the vision of a statesman, James Bradley Thayer, to the end that responsibility for mischievous or inadequate legislation may be sharply brought home where it belongs, — to the legislature and to the people themselves.[10]

Felix Frankfurter.

DUE PROCESS OF LAW IN THE FRANK CASE. — Leo Frank, after three unsuccessful attempts to have a conviction of murder set aside by the Supreme Court of Georgia [1] and a fruitless application to the Supreme Court of the United States for a writ of error,[2] petitioned a United States District Court for a writ of *habeas corpus*. The denial of this petition without a hearing on the facts was recently upheld by a majority decision of the Supreme Court.[3] *Frank* v. *Mangum*, 35 Sup. Ct. 582. While the dramatic interest of this *cause célèbre* has been uppermost in the popular mind, the intricate legal issues of the latest appeal make it noteworthy for the profession. The appellant sought to raise the constitutional question necessary for federal *habeas corpus* [4] by contending that he had been deprived of due process of law, first by the reception of the verdict in his absence, and secondly by mob domination of the jury.

The court was unanimous that the first position could not be maintained. Due process of law does not forbid a state statute depriving criminals of indictment and trial by grand and *petit* juries, and the right to appeal.[5] As presence of the accused at all stages of the trial is not an essential of due process,[6] it is submitted that a statute compelling the accused to waive his absence at the reception of the verdict unless timely advantage were taken of it should be upheld as a reasonable measure to prevent dilatory tactics without impairing substantial justice. In the principal case there was no such statute, but the state court held that under the local practice appellant's failure to rely upon this known ground on the first motion for a new trial amounted to such a waiver.[7] If such a rule had in fact been previously established by the courts, a decision in conformity therewith would be no more objectionable than a statute. The appellant contended, however, that the court's decision was an erroneous departure from the established state law [8] and hence a deprivation of due process. But even if the state court's decision, which seems well supported, overruled previous authorities, the Fourteenth Amendment would not give the federal courts jurisdiction to disregard

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[10] See THAYER, LEGAL ESSAYS, pp. 39, 41.

[1] Frank *v.* State, 141 Ga. 243, 80 S. E. 1016, 27 HARV. L. REV. 762; Frank *v.* State, 83 S. E. 233 (Ga.) ; Frank *v.* State, 83 S. E. 645 (Ga.).

[2] In the Matter of Frank, Petitioner, 235 U. S. 694 (without opinion).

[3] Holmes, J., and Hughes, J., dissenting. For a more detailed statement of the case, see RECENT CASES, p. 810.

[4] U. S. R. S. 753.

[5] Hurtado *v.* California, 110 U. S. 516; Maxwell *v.* Dow, 176 U. S. 581; Andrews *v.* Swartz, 156 U. S. 272.

[6] Howard *v.* Kentucky, 200 U. S. 164.

[7] Cawthon *v.* State, 119 Ga. 395, 46 S. E. 897; Leathers *v.* Leathers, 138 Ga. 740, 76 S. E. 44.

[8] Citing Nolan *v.* State, 53 Ga. 137; S. C. 55 Ga. 521.

this erroneous ruling unless a statute embodying the new rule laid down would be itself unconstitutional.[9] The appellant's further contention that an alteration in the course of decisions would be an *ex post facto* law is clearly untenable, for this clause applies only to legislation.[10]

But the second point gave the court more trouble. The majority apparently conceded that conviction by a jury dominated by a mob, even in a court of competent jurisdiction by the law of its creation, would not be due process. If such a conviction is upheld by a state court of appeal it is more than an erroneous departure from the requirements of the state law. A *statute* to legalize lynch law would be unhesitatingly struck down. A single *decision* upholding it is equally obnoxious to the Fourteenth Amendment, which is not, like the *ex post facto* clause, restricted in its application to legislation alone.[11] Although this might at first seem clearer in the case of habitual departure from a valid statute,[12] the Amendment was designed to protect the individual,[13] and the invidious discrimination of the state agency against a single victim falls within the additional prohibition against denying to any person the equal protection of the laws. This view may lead to a potential federal question in every state case. But many determinants of the line which divides mere errors from constitutional infringements are furnished by the cases settling what statutory modifications of procedure are invalid. And the practical difficulty cannot prevent intervention by the federal courts where due process is denied.

Manifestly, where such a question is raised, the Supreme Court must have the right on writ of error to go behind the state court's finding of facts and independently examine the record. Otherwise a state court could deprive the Supreme Court of jurisdiction by an erroneous finding that alleged facts did not sufficiently establish mob domination of a jury.[14] At a hearing to determine whether *habeas corpus* shall issue, the federal court in addition is authorized by statute to investigate all facts, even extraneous to the record, bearing upon the petitioner's alleged unconstitutional detention.[15] As this was conceded by the majority in the principal case, the discussion narrowed down to the question whether the petition showed upon its face that the appellant was not entitled to a hearing. The federal courts are properly cautious in exercising the delicate jurisdiction by which a state is deprived of its custody over a convicted criminal. No hearing will be granted where the state courts

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[9] Central Land Co. *v.* Laidley, 159 U. S. 103; *In re* Converse, 137 U. S. 624; Storti *v.* Massachusetts, 183 U. S. 138; but see for an able argument *contra*, "The Supreme Court of the United States and the Enforcement of State Law by State Courts," by Professor Henry Schofield, 3 ILL. L. REV. 195; *cf.* WILLOUGHBY, THE CONSTITUTION, § 472.

[10] Ross *v.* Oregon, 227 U. S. 150.

[11] *Ex parte* Virginia, 100 U. S. 339; Scott *v.* McNeal, 154 U. S. 34. See Judge Swayze in 26 HARV. L. REV. 1, 2.

[12] Yick Wo *v.* Hopkins, 118 U. S. 356; see WILLOUGHBY, THE CONSTITUTION, § 759.

[13] The single victim of a court decision which violated the Fourteenth Amendment was protected in Chicago, B. & Q. R. *v.* Chicago, 166 U. S. 226; Scott *v.* McNeal, *supra*.

[14] *Cf.* the right of the Supreme Court to go behind the state court's findings in cases under the contract clause, to ascertain whether a valid contract existed. Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436; McCullough *v.* Virginia, 172 U. S. 102.

[15] R. S. 754–761.

have not finally disposed of the case,[16] and even then the petitioner may be left to his writ of error to the United States Supreme Court.[17] In the principal case, the petitioner relied upon a bald reassertion of the same facts which, as the petition showed, had been twice found untrue by the Supreme Court of Georgia. While, as has been seen, this conclusion is by no means binding, the majority may well be justified in refusing a hearing without the allegation of some additional facts or reasons why the state court's findings should be treated with such scant respect. The court may reasonably assume that the petitioner's case has been put in its strongest aspect on the petition. Any other rule of pleading would make the writ of *habeas corpus* peculiarly efficient as a weapon to prolong trials and postpone punishments.[18]

THE MAXIM: NO PRESUMPTION UPON A PRESUMPTION. — Authorities on the law of evidence generally agree with the remark of a recent text-writer that the term "presumption" is, in the law, "entirely superfluous" and "principally used, at the present time, on account of its convenient obscurity." [1] This censure applies both to what are called "presumptions of law" and what are called "presumptions of fact." [2] The former is simply a cloak to cover various rules of substantive law.[3] For instance, the courts really created a rule of property that adverse possession for twenty years bars the disseisee when they said that a lost grant would be "presumed" as a matter of law after that period. The latter is an imposing term usually signifying that the jury has been logical and reasonable in drawing certain inferences from proven facts.[4] If there be obscurity due to failure to analyze and see in just what sense the word is used when used singly, it is doubly delusive when encountered in the common maxim, "there shall be no presumption upon a presumption." This doctrine, though capable of other interpretations, is limited in the books to the meaning that an inference, sometimes called a "presumption of fact," may not be based upon another inference, but must

[16] Baker *v.* Grice, 169 U. S. 284; *In re* Wood, 140 U. S. 278. *Cf.* Gray, J., in Whitten *v.* Tomlinson, 160 U. S. 231, 240, "To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states and with the performance by this court of its proper duties."

[17] See Cook *v.* Hart, 146 U. S. 183, 194; WILLOUGHBY, THE CONSTITUTION, § 71.

[18] See CHURCH, HABEAS CORPUS, 149, n. 3; *cf.* GUTHRIE, FOURTEENTH AMENDMENT, 177 ff.

[1] See 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE, § 1026; 4 WIGMORE, EVIDENCE, § 2491; J. B. Thayer, "Presumptions and the Law of Evidence," 3 HARV. L. REV. 141, 166.

[2] J. B. Thayer, *supra*, at p. 166. "In dealing with the subject of evidence it is expedient to avoid the use of these terms, presumptions of law and presumptions of fact, for they do not help the discussion, and they are worse than useless, from their ambiguity."

[3] See J. B. Thayer, *supra*, at p. 148; BEST, EVIDENCE, 11 ed., § 304. "Presumptions of law are in reality rules of law and a part of the law itself." Doane *v.* Glenn, 1 Colo. 495, 504.

[4] See BEST, EVIDENCE, § 304; CHAMBERLAYNE, EVIDENCE, § 1027. "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is in probability." Liverpool, etc. Ins. Co. *v.* Southern Pacific Co., 125 Cal. 434, 58 Pac. 55.